IN THE SUPREME COURT OF FLORIDA

JEFFERY A. FARINA,

Defendant/Appellant/
Cross-Appellee,

v.

STATE OF FLORIDA,

Plaintiff/Appellee/
Cross-Appellant.

CASE NO. 80,985

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

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POINT I

EXECUTION OF THIS SIXTEEN-YEAR-OLD INFANT OFFENDER VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State argues, "Simply because a sixteen year old has not recently been executed in the State of Florida does not mean as appellant seems to suggest that such execution would be "unusual." ("AB" at 34). In reply, Appellant submits that the execution of *this* sixteen-year-old offender would be unusual and barred by Amendments VIII and XIV, United States Constitution and Art. 1, § 17 of the Florida Constitution because of the absence of any comparable instance, in Florida or the United States, where a death sentence has been approved under the material facts of this case, just two of which are the age of this infant offender and the fact that he has no prior history of criminal activity. Florida's death penalty is reserved for the most aggravated *and* least mitigated of capital crimes. ***Dixon v. State***, 283 So.2d 1 (Fla. 1973). This crime is neither.

A meaningful proportionality review ensures that Florida's death penalty is consistently used. See, ***Kramer v. State***, 619 So.2d 274, 278 (Fla. 1993) ("Our law reserves the death penalty only for the most aggravated and least mitigated murders, of which this clearly is not one.") (9-3 death recommendation); ***DeAngelo v. State***, 616 So.2d 440, 443 (Fla. 1993) (death sentence "in this case is disproportionate when compared with other capital cases where this Court has vacated

the death sentence and imposed life imprisonment.") (7-5 death recommendation); ***Clark v. State***, 609 So.2d 513, 516 (Fla. 1992) (death sentence imposed in accordance with jury's 10-2 death recommendation disproportionate even in absence of any statutory mitigating considerations).

In ***Fitzpatrick v. State***, 527 So.2d 809 (Fla. 1989), this Court compared the material facts of that case to the facts of other cases where death sentences have been reversed and found that Fitzpatrick's death sentence was not warranted, even though his jury had recommended a death sentence:

> Therefore, we find that this case does not warrant the imposition of our harshest penalty. We must emphasize that our decision is not a reweighing of aggravating and mitigating circumstances. Quite simply, we believe that in comparison to other cases involving the imposition of the death penalty, this punishment is unwarranted in this case. *Ferry v. State*, 507 So.2d 1373 (Fla. 1987); *Amazon v. State*, 487 So.2d 8 (Fla.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986).

Fitzpatrick, 527 So.2d at 812.

A death penalty is arbitrary if a death sentence is vacated in one case yet found to be warranted in another case under substantially the same facts. Thus, to avoid inconsistent and capricious imposition of the death penalty, which violates Amendments VIII and XIV to the United States Constitution and/or Art. 1, § 17 of the Florida Constitution, this Court on direct appeal conducts a thorough review to assure that similar facts produce similar results, as was promised in ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). See, ***Clark v. State***, 609 So.2d 513 (Fla.

1992) (death sentence after 10-2 death recommendation reversed); ***Richardson v. State***, 604 So.2d 1107 (Fla. 1992) (death sentence after 11-1 death recommendation reversed); ***McKinney v. State***, 579 So.2d 80, 85 (Fla. 1991) (death sentence reversed after 8-4 death recommendation); ***Penn v. State***, 574 So.2d 1079 (Fla. 1991) (death sentence reversed after death recommendation); ***Songer v. State***, 544 So.2d 1010 (Fla. 1989) (death sentence reversed after death recommendation); ***Blair v. State***, 406 So.2d 1103 (Fla. 1981) (death sentence reversed after death recommendation).

The State has failed to draw this Court's attention to any case in which the death penalty has been approved under the material facts that exist here. As previously set forth in the Initial Brief and as more thoroughly discussed later in this brief, this jury recommendation is unreliable and entitled to no weight due to serious errors, such as faulty juror-selection (Point II), faulty jury instructions (Point V), prosecutorial misconduct (Point IV), and improper influences caused by media coverage (Point II). Even assuming the death recommendation is acceptable, imposition of the death penalty here is "unusual" punishment because a death sentence has never been approved under these material facts. The sentencers used improper aggravating factors which were legally unsupported by the evidence and/or which are otherwise unconstitutionally vague under Art. 1, § 17 of the Florida Constitution and Amendments VIII and XIV to the United States Constitution.

The State argues that Florida's "especially heinous, atrocious or cruel" (HAC) factor was warranted under these facts at pages 35-40 of its brief. In that respect, the State relies on ***White v. State***, 403 So.2d 331 (Fla. 1981), as being comparable with the instant case. In ***White***, decided in 1981 before ***Espinosa v. Florida***, 505 U.S. ___, 112 S.Ct. 2926 (1992) and ***Maynard v. Cartwright***, 486 U.S. 356 (1988), the HAC factor was applied for six murders that occurred in a home following hours of abuse:

> We believe the events surrounding the slayings in this case readily distinguish it from the slaying which occurred in [*Cooper v. State*, 336 So.2d 1133 (Fla. 1976)] and hold that the evidence sustains the trial judge's finding that these capital felonies were especially heinous, atrocious or cruel. In reaching our conclusion we note that we are also influenced by the magnitude of the criminal conduct. The calculated slaughter of six individuals and attempted slaughter of two others sets the capital felonies apart from the "norm" of capital felonies. Even one of the co-felons characterized the episode as "the St. Valentine's Day Massacre."

White, 403 So.2d at 339. The phrases used in ***White*** to justify use of this factor, specifically, the "events surrounding the slayings" and the "magnitude of the criminal conduct" which "sets the capital felonies apart from the 'norm, of capital felonies," form a very subjective and indefinite test that fails to genuinely limit the class of persons eligible for the death penalty. That language fails to provide any meaningful guidance as to when the factor applies and when it does not, and it permits the factor to be used at whim based on the particular facts or events of any given case.

The "magnitude of the criminal conduct" in ***White*** was the calculated murder of six persons and the attempted murder of two more after hours of abuse. The material facts of ***White*** do not equate with those in the present case, where one person died following a typical robbery that spanned approximately a half hour. These employees were not abused prior to the shooting and were re-assured that no one would be hurt. The shooting was sudden and it took everyone by surprise. Ms. Van Ness was the third person shot. The record conclusively shows that she was immediately rendered unconscious and that she did not regain consciousness before dying. Her death was not "especially heinous, atrocious or cruel" as that factor is now strictly defined, and as will be discussed in depth later in this point.

However, as to whether the evidence is legally sufficient to prove the existence of the HAC factor in this case, it is clear that under the present standard the killing of Ms. Van Ness was not especially heinous, atrocious or cruel. In ***Bonifay v. State***, 18 FLW S464, 465 (Fla. September 2, 1993), this Court unequivocally held:

> The record fails to demonstrate any intent by [the defendant] to inflict a high degree of pain or otherwise torture the victim. *The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering.*

Bonifay, 18 FLW at 455, (emphasis added).

Here, the State produced absolutely no evidence that this defendant "intended to cause the victim unnecessary and prolonged pain." In fact, the State proved just the opposite. Jeffery Farina sought to re-assure the employees and he tied the men's hands so that the bindings would not be too tight. (State's Exh. 58). The sentencers' use of the HAC factor to impose this death sentence over timely objection violated the Eighth and Fourteenth Amendments because the discretion to impose a death sentence was not truly limited and, in fact, the particular facts of this crime were such that improper considerations would be used to impose the death sentence under the broad heading of a heinous, atrocious or cruel murder. There are no facts showing that this murder was intended to be unnecessarily torturous.

Used in this manner, the HAC factor fails to genuinely limit the class of persons eligible for the death penalty as explained in ***Espinosa***, supra, just as use of the cold, calculated and premeditated (CCP) factor fails to genuinely limit imposition of the death penalty. The State argues that the CCP factor was justified because of "Anthony's comment that we should have slit their throats." (AB at 40). Anthony's statements pertain to Anthony because, "In the realm of capital punishment in particular, individualized consideration [is] a constitutional requirement . . . ." ***Stanford v. Kentucky***, 492 U.S. 361, 375 (1989). The State cannot use Anthony's statement and attribute its content to Jeffery.

In that regard, Jeffery is the sixteen-year-old, infant offender who said, "I tied them up. I didn't, wasn't sure how to tie 'em up. 'Cause I didn't want to tie them up too tight, you know? See, how we should have done it is you and me both should have had like stockings or something on. I don't know, there's nothing we can do about it now." (State's exh. 58). This candid statement not only reflects the lack of planning that went into the robbery, but also shows that Jeffery was at the time concerned about tying the employees too tightly.

The State argues that the CCP factor was properly used by these sentencers because State's 58 shows a pre-existing plan to murder. (AB-at 41). It does not. Rather, it shows that the plan to rob the Taco Bell was ill conceived and poorly thought out from the very beginning. This is reinforced by co-defendant Henderson, who testified that the only plan of which he was aware was that a robbery would occur and that there were no discussions of anyone being harmed:

> Q: (Prosecutor) So, you're not responsible for anything that happened at Taco Bell. Is that the way you feel?
>
> A: (Henderson) No, I didn't say that. I'm just as responsible as they are.
>
> Q: You knew what was happening in Taco Bell, didn't you, you knew there was going to be a robbery?
>
> A: Oh, I didn't say I didn't know about the robbery. I said that I did know about the robbery. I'll be the first one to admit, I knew about the robbery. But I didn't know no one was going to get shot.

(TR421-422).

The evidence showed that, just before the shooting, the following discussion occurred between the Farinas:

> The ***robbery*** had been talked about and planned for a couple of weeks. The Farinas discussed ***it*** extensively the day of the robbery/murder. (T879). They discussed what would happen if someone tried to come at them or attack them. Dr. Krop reviewed the tapes of the conversation between Jeffery and Anthony in the back seat of the police car. (T880). Jeffery referenced his earlier statement to the police and indicated he told her exactly what had happened inside -- they got the cash, Anthony called him into the office as the victims were in the cooler and said "what do you want to do? It's your call from here. It's your show." Jeffery thought ***for a moment***, then said "I'm going ***to shoot*** them." Anthony asked "When?" Jeffery replied "You tell them to get in the freezer." Anthony told them to get in the freezer and Jeffery shot them.

(AB at page 22, emphasis added). As a matter of law, the CCP factor, as applied by this Court, does apply under such facts.

It is clear that, for the CCP factor to properly be applied, a plan to commit a felony will not suffice. Instead, a pre-existing plan to commit *murder* must be formed prior to the felony because the CCP factor requires more than premeditation to kill. Otherwise, it would be found in every premeditated murder conviction and would thus fail to genuinely limit the class of persons eligible for the death penalty contrary to the Eighth and Fourteenth Amendments to the United States Constitution. Section 921.141(5)(i) authorizes imposition of the death penalty when the "capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." The terms are in the conjunctive. The term "'calculation' consists of a careful plan or pre-arranged design." ***Rogers v. State***, 511 So.2d 526, 533 (Fla. 1987).

In ***Farinas v. State***, 569 So.2d 425 (Fla. 1990), this Court rejected the trial court's use of the CCP factor, reversed a death sentence that had been imposed pursuant to a jury recommendation, and remanded for imposition of a life sentence. There, premeditation to kill was shown by the defendant's acts of unjamming his gun three times before finally killing his victim. Yet that evidence was inadequate to show CCP because the murder, though premeditated, was not the product of a pre-existing plan. Even under the State's version of the facts set forth in its Answer Brief, the CCP factor cannot apply. The decision was to "shoot" the employees, not necessarily to kill them. It bears mentioning that all employees were alive when the Farinas left. Premeditation may legally be found to exist under these facts. Heightened premeditation to apply the CCP factor cannot. The sentencers' use of this and the HAC factor to impose this death sentence violated the Eighth and Fourteenth Amendments because the factors were unsupported by the evidence.

The death recommendation further violates Amendments VIII and XIV to the United States Constitution because of the vagueness of the HAC and CCP factors. The jury instructions that concern these factors were given here over timely objection. (R955;995-997;3026). The instructions failed to genuinely limit the class of persons eligible for the death penalty in violation of Amendments VIII and XIV to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Heightened standards of due process apply to imposition of the death penalty due to its severity, uniqueness and finality. See, ***Elledge v. State***, 346 So.2d 998 (Fla. 1977); ***Beck v. Alabama***, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty *and* must reasonably justify the imposition of a more severe sanction on the defendant compared to others found guilty of murder. ***Arave v. Creech***, 507 U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993); ***Lowenfield v. Phelps***, 484 U.S. 321, 108 S.Ct. 546, 554 (1988). "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." ***Zant v. Stephens***, 462 U.S. 862, 877 (1983).

In Florida, the aggravating considerations that "limit" the class of people eligible for the death penalty are listed in Section 921.141(5), Florida Statutes (1989). See, ***Elledge v. State***, 346 So.2d 998 (Fla. 1977). As set forth in the statute and as instructed here, the HAC factor is so broad that it fails to genuinely limit the class of persons eligible for the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. I, Sections 9, 16, 17 and 22 of the Florida Constitution. ***Furman v. Georgia***, 408 U.S. 238 (1972). Because the jury recommendation has such a dramatic impact on imposition of a death sentence, constitutional

error occurs when a jury is instructed in terms that fail to adequately guard against arbitrary or capricious imposition of the death penalty. ***Espinosa v. Florida***, 112 S.Ct. 2926 (1992).

Section 921.141(5)(h), Florida Statutes, authorizes imposition of the death penalty if "the capital felony was especially heinous, atrocious or cruel." That bare language fails to genuinely limit the class of persons eligible for the death penalty and it is therefore unconstitutional under the Eighth and Fourteenth Amendments. ***Maynard v. Cartwright***, 486 U.S. 356 (1988); ***Godfrey v. Georgia***, 446 U.S. 420, 429 (1980). This Court has attempted to apply a "narrow construction" of the vague statutory terms so that the aggravating factor is given a more precise meaning than the identical Oklahoma statute that was condemned in ***Maynard***, supra. See, ***Smalley v. State***, 546 So.2d 720, 722 (Fla. 1989). That "precise" definition, and the one given to this jury over objection, is as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one that is accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1973).

In twenty years of appellate review of death sentences since *Dixon*, those definitions have been used to regulate use of the especially heinous, atrocious or cruel aggravating factor. Thus, a track record exists as to whether those definitions truly limit application of the HAC factor. If the *Dixon* definitions are indeed sufficient to ensure consistent and controlled application of the especially heinous, atrocious or cruel statutory factor, there should be little inconsistency in the decisions that use that standard to monitor use of the "heinous, atrocious or cruel" factor in Florida. It is evident that these definitions are as vague and unconstitutional as are the bare terms of the statute condemned in *Espinosa v. Florida*, 112 S.Ct. 2926 (1992).

These standards do not produce a genuine limitation on the class of persons eligible for the death penalty. Time and again, under the strictures of definitions that "guarantee" a narrow construction of the statute's terms, arbitrary results occur based on identical operative facts. For example, in *Raulerson v. State*, 358 So.2d 826 (Fla. 1978), the trial court's application of the HAC factor was approved by this Court. After resentencing pursuant to order of the Middle District of Florida, *Raulerson v. Wainwright*, 408 F.Supp. 381 (M.D. Fla. 1980), Raulerson was again sentenced to death and the HAC factor was again used by the trial judge. This time it was rejected by this Court **on the same facts**. *Raulerson v. State*, 420 So.2d 567, 571 (Fla. 1982). It is arbitrary for this factor to be both approved and, later, disapproved in the same case, on the same facts.

The standard changes. For instance, in ***Hitchcock v. State***, 578 So.2d 685 (Fla. 1990), the focus for application of the HAC factor was on the perception of the victim - what the perpetrator intended was irrelevant:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious or cruel. ***This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's***. See, **Stano v. State**, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Hitchcock, 578 So.2d at 692 (emphasis added). Thus, irrespective of whether the perpetrator intended that a murder be prolonged or painful, under case law, the factor depends on the *victim's* perception of the facts. Yet, in other cases, the intent of the perpetrator was found to be paramount. See, ***Omelus v. State***, 584 So.2d 563, 566 (Fla. 1991) (HAC factor could not be applied vicariously to the defendant who hired another to commit the murder with a gun rather than a knife); ***Teffeteller v. State***, 439 So.2d 840, 847 (Fla. 1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm.").

At present, the HAC factor should not be found unless the defendant intended that a torturous murder occur. See, ***Mills v. State***, 476 So.2d 172, 178 (1985) ("The intent and method employed by the wrong doer is what needs to be examined.";

Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) (HAC factor rejected where record is consistent with the hypothesis that crime "was not meant to be deliberately and extraordinarily painful."); *Amoros v. State*, 531 So.2d 1256, 1260 (Fla. 1988) (HAC factor rejected where victim shot three times after making "a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door.").

However, another portion of the *Dixon* standard, given here over objection (R3026;TR984-986), states, "The kind of crime intended to be included as heinous, atrocious, or cruel is one that is **accompanied by additional acts** that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." The "accompanied by additional acts" language is a nebulous catch-all that permits unconstitutional and limitless considerations that invade the sentencing equation on an *ad hoc* basis. Interestingly, that catch-all language is precisely what the State emotionally uses in imploring this Court to find that the HAC factor is present. Specifically, the State urges that this murder was heinous, atrocious, or cruel because of additional considerations which set this case apart from the norm: "The present case is no less repugnant to the common man's sense of dignity and embodies the worst nightmare of those who must toil for a living in retail or food establishments where they may fall prey to the opportunistic or simply someone who had a boring day." (AB at 38).

As emotionally compelling as the State's outside-the-record observations are, such improper considerations are not what is required to find this factor as it was defined by this Court in *Dixon*. The factor must be rejected if the murder was not intended to be extraordinarily painful or unnecessarily cruel. See, *Porter v. State*, 564 So.2d 1060, 1063 (Fla. 1990) (HAC factor rejected where record is consistent with the hypothesis that crime "was not meant to be deliberately and extraordinarily painful."); *Amoros v. State*, 531 So.2d 1256, 1260 (Fla. 1988). *Bonifay*, supra.

Here, even though it was a foregone conclusion that the trial court would overrule the objections based on this Court's prior, express rulings on these questions, defense counsel again unsuccessfully contested the constitutionality of Florida's HAC factor and the constitutionality of the jury instruction given to this jury on these exact grounds. (R3026;TR984-986). The portion of the HAC instruction that HAC is properly weighed when a murder is **"accompanied by additional acts** that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim" injects arbitrariness and indefiniteness into the sentencing determination. It is used arbitrarily to apply this factor.

For instance, where (geographically) a person is when he or she was killed is essentially irrelevant to whether the killing was conscienceless, pitiless, or unnecessarily torturous to the victim. Apparently for that reason, this Court at first

disapproved the application of the HAC factor based on the fact that a victim was at home when killed. See, ***Simmons v. State***, 419 So.2d 316, 319 (Fla. 1982) ("The finding that the victim was murdered in his own home offers no support for the [HAC] finding."). Then, two years later in ***Troedel v. State***, 462 So.2d 392, 398 (Fla. 1984), this Court stated, "the fact that the victims were killed in their home sets the crime apart from the norm." See, ***Perry v. State***, 522 So.2d 817, 821 (Fla. 1988) ("We note also that this vicious attack was within the supposed safety of Mrs. Miller's own home, a factor we have previously held adds to the atrocity of the crime.").

Another example is found in ***Proffitt v. State***, 315 So.2d 461 (Fla. 1975), *affirmed*, ***Proffitt v. Florida***, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), where the HAC factor was found by the trial court and approved on appeal because a man was stabbed in the chest while asleep in his bed. Yet, the factor was **not** applied when Proffitt was resentenced to life. ***Proffitt v. State***, 510 So.2d 896, 897 (Fla. 1987). The same operative facts were present - a man was stabbed in the chest while he slept in his bed in his own house. Yet, in the same case, based on the same facts, different results occurred.

These inexplicable vacillations are an arbitrary result made possible by loose definition of what is meant by the phrase **"accompanied by additional acts** that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." The vacillation shows arbitrariness and the ability of

the factor to be approved by whim rather than consistent, reasoned judgment. The "additional acts" language is unconstitutionally vague based on its use of "defensive" wounds to authorize a death sentence. At times, the fortuitous position of a victim's hands when he or she was assaulted is irrelevant to find this factor. **See**, ***Menendez v. State***, 368 So.2d 1278, 1282 (Fla. 1979) ("Although his arms may have been in a submissive position at the time when he was shot - a fact which is subject to other reasonable interpretations - there is nothing to set his execution murder 'apart from the norm of capital felonies.'"). At other times, the HAC factor is based on the infliction of "defensive" wounds. **See**, ***Perry v. State***, 522 So.2d 817, 821 (Fla. 1988) ("Evidence that a victim was severely beaten while warding off blows before being fatally shot has been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel."). There were no defensive wounds present in the instant case, which stands as a legitimate reason to disapprove this factor.

In short, the definitions provided in ***Dixon*** have failed to genuinely narrow the discretion of when the heinous, atrocious or cruel statutory aggravating factor is properly applied in support of a death sentence. This standard, first articulated in ***Dixon***, frustrates the clear import of ***Maynard v. Cartwright***, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and ***Espinosa v. Florida***, 112 S.Ct. 2926 (1992). It violates Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Clearly under the cases set forth above using the definitions set forth in ***Dixon***, the HAC factor cannot be found to exist under these facts. It was therefore constitutional error for the factor to be considered and found by the sentencers.

The same constitutional problems inhere in Florida's CCP factor and the standard instruction that was given in this case over timely, written objection. In ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985), this Court disapproved finding the ("CCP") factor where a robber shot a store clerk three times. The Court held, "the cold, calculated and premeditated factor *applies to a manner of killing* characterized by heightened premeditation beyond that required to establish premeditated murder." ***Caruthers***, 465 So.2d at 498 (emphasis added). Eight pages later, in the next reported decision, use of the factor was approved because "this factor focuses more on the perpetrator's state of mind than on the method of killing." ***Johnson v. State***, 465 So.2d 499, 507 (Fla. 1986). Yet, in ***Provenzano v. State***, 497 So.2d 1177, 1183 (Fla. 1986), this Court held, "as the statute indicates, if the murder was committed in a ***manner*** that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." (emphasis in original). Then, in ***Banda v. State***, 536 So.2d 221, 225 (Fla. 1988), the Court disapproved use of the factor because "a colorable claim exists that this murder was motivated out of self-defense."

The foregoing standards governing use of this factor vacillate for no apparent reason. Neither the factor nor the case law provides sufficient guidance as to when the CCP factor is to be properly found and weighed by the sentencer. The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. ***Reed v. Reed***, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); ***Moore v. City of East Cleveland***, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal enactments. ***State v. Walker***, 461 So.2d 108 (Fla. 1984). Thus, criminal statutes "must bear a reasonable relationship to the legislative objective and must not be arbitrary." ***Potts v. State***, 526 So.2d 104 (Fla. 4th DCA 1987), ***aff'd.***, ***State v. Potts***, 526 So.2d 63 (Fla. 1988). Therefore, if the CCP factor is to be used as a distinguishing feature between cases where imposition of the death penalty is authorized and cases where it is not, something more than simple premeditation is required for the factor to be properly found, and to be constitutional, that additional requirement must also justify imposition of the more severe penalty.

The CCP factor was not contained in the initial death penalty legislation that was enacted following the United States Supreme Court's condemnation of statutes allowing arbitrary and capricious use of the death penalty. Rather, the Florida Legislature added the CCP factor later, in 1979, "to include execution-type killings as one of the enumerated aggravating

circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). **See**, Barnard, ***Death Penalty (1988 Survey of Florida Law)***, 13 Nova L. Rev. 907, 936-37 (1989). This court observed the constitutional concerns that impact upon this and other aggravating factors in *Porter v. State*, 564 So.2d 1060, 1063-64 (Fla. 1990), as follows:

> To avoid arbitrary and capricious punishment, this aggravating circumstance 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' *Zant v. Stephens,* 462 U.S. 862, 877 (1983)(footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The Eighth Amendment requires that an aggravating factor "must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." ***Lewis v. Jeffers***, 110 S.Ct. 3092, 3099 (1990). The use of the CCP factor in Florida has not met this constitutional requirement, primarily due to the vagueness of the terms of the factor and the absence of any limiting construction being given to the jury, as here.

This aggravating circumstance applies when the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Section 921.141(5)(i), Florida Statutes. The requirement of commission in a "cold, calculated, and premeditated manner" gives no real guidance as to when this factor should be found. While the word

"premeditated" may be meaningful, definitions of the adjectives "cold" and "calculated" are vague and subjective. These terms are directed to emotions, and they fail to genuinely limit the class of persons eligible for the death penalty because these terms have meanings that can be found by reasonable persons to apply to virtually every premeditated murder.

Specifically, Websters New Twentieth Century Unabridged Dictionary (Second Edition) defines cold, as follows:

> 1. of a temperature much lower than that of the human body; very chilly, frigid.
>
> 2. lacking heat; having lost heat; of less heat than is required; as, this soup is cold.
>
> 3. having the sensation of cold; feeling chilled, shivering; as, I am cold.
>
> 4. bland; lacking pungency or acridity. Cold plants have a quicker perception of the heat of the sun than the hot herbs. Bacon.
>
> 5. dead; lifeless. Ere the placid lips be cold. Tennyson.
>
> 6. without warmth of feeling; without enthusiasm, indifferent, as a cold personality.
>
> 7. not cordial; unfriendly; as a cold reception.
>
> 8. chilling; gloomy; dispiriting; as, they had a cold realization of their plight.
>
> 9. calm; detached; objective; as, cold logic.

10. designating colors that suggest cold, as, those of blue, green, or gray.

11. still far from what is being sought and of the seeker.

12. completely mastered; as, the actor has his lines down cold (Slang).

13. insensible; as, the boxer was knocked cold. (Slang).

14. in hunting, faint; not strong; said of a scent.

cold comfort; little or no comfort at all; in cold blood; without the excuse of passion, with deliberation.

to catch cold; to become ill with a cold; also to take cold.

to throw cold water on; to discourage where support was expected; to introduce unlooked for objections.

syn. -- wintry, frosty, bleak, indifferent, unconcerned, passionless, apathetic, stoical, unfeeling, forbidding, distant, reserved, spiritless, lifeless.

Id. at 354. Thus, there are fourteen different definitions of just one word contained in this statutory factor. The five most common definitions are not relevant here. However, definitions 6, 8, and 9 above all are arguably can be applied by jurors and/or judges, whose discretion to impose death sentences is to be meaningfully restricted by aggravating factors. These words describe highly subjective, emotional states.

Similarly, the term "calculated" has many definitions, all of which are highly subjective. The word "calculated" is commonly understood to mean the following:

> 1. relating to something which may be or has been subjected to calculation; as, a calculated plot.
>
> 2. designed or suitable for; as, a machine calculated for rapid work. [Colloq.]

Websters, supra, at 255. The term calculate also means:

> 1. to ascertain by computation; to compute; to reckon; as, to calculate distance.
>
> 2. to ascertain or determine by reasoning; to estimate.
>
> 3. to fit or prepare by adaption of means to an end; to make suitable; generally in the past participle.
>
> This letter was admirably calculated to work on those to whom it was addressed. McCauley.
>
> 4. to intend; to plan; used in the passive.
>
> 5. to think; to suppose; to guess; as, I calculate it will rain. (Coloq.)
>
> Syn. -- compute, estimate, reckon, count.

Websters, supra, at 255.

Thus, the terms "cold" and "calculated" suffer from the same deficiency as the terms denounced in ***Espinosa***, supra, and ***Maynard v. Cartwright***, supra, The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content. Use of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. This is especially

true when considered in the context of the special need for reliability in capital sentencing.

Simply said, Section 921.141(5)(i), Florida Statutes is unconstitutionally vague and overbroad on its face and as applied in violation of Amendments V, VIII and XIV to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. This factor purportedly applies when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Florida Statutes. It does not satisfy the constitutional purpose of an aggravating factor:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743 (1983). The discretion to impose the death penalty be must be narrowly controlled pursuant to the Eighth and Fourteenth Amendments, and presumably by Art. I, Section 17 of the Florida Constitution. *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976):

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

Statutory aggravating factors that authorize imposition of the death penalty must truly channel sentencing discretion by clear and objective standards:

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In ***Godfrey***, the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting construction must, as a matter of Eighth Amendment law, be both provided to sentencing juries through instruction by the court and be consistently applied from case to case. Id. at 429-433. Because, in Florida, the jury is a tantamount to a co-sentencer, the "limiting construction" used by the trial judge and/or by this Court must be passed on to the jury or its recommendation violates the above-discussed constitutional considerations.

An aggravating factor must genuinely narrow the class of persons eligible for the death penalty, according to rational

criteria, which are rationally and consistently applied. ***McClesky v. Kemp***, 481 U.S. 279 (1987):

> [Our] decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

McClesky, 481 U.S. 279 (1987). Although a state's death penalty statute may be facially constitutional, an individual aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. ***State v. Chaplin***, 437 A.2d 327, 330 (Del. Super. Ct. 1981); ***State v. White***, 395 A.2d 1082 (Del. 1978); ***People v. Superior Court (Engert)***, 647 P.2d 76 (Cal. 1982); ***Arnold v. State***, 224 S.E.2d 386 (Ga. 1976); ***Cartwright v. Maynard***, 822 F.2d 1477 (10th Cir. 1987); ***Collins v. Lockhart***, 754 F.2d 958 (8th Cir.), cert. denied, 106 S.Ct. 546 (1985). Section 921.141(5)(i), on its face and as applied, has failed to "genuinely narrow the class of persons eligible for the death penalty." This aggravating circumstance has become a "catch-all" aggravating circumstance that can be, and that is, used at whim. This is directly violative of the teachings of ***Furman***, ***Greg***, ***Godfrey***, and ***McCleskey***. Even where the Florida Supreme Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with consistency.

Section 921.141(5)(i) is unconstitutionally vague on its face. The words of the aggravating circumstances themselves give no real indication as to when it should be applied. It is well established that a statute, especially a criminal statute, must be definite to be valid. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

> No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids.

Lanzetta, 306 U.S. at 453. Definiteness is essential to the constitutionality of a statute:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution and an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . .

Grayned v. City of Rockford, 407 U.S. 104, 109, 98 S.Ct. 2924, 33 L.Ed.2d 222 (1972). The Supreme Court has emphasized that the danger of arbitrary enforcement, rather than actual notice, is actually the more important aspect of the vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 356, 358-59, 103 S.Ct. 1855, 1858-59 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974). The need for definiteness is dramatically heightened in the context of capital sentencing. The Supreme Court has recognized that death is different from any other punishment which can be imposed and

calls for a greater degree of reliability due to its severity and finality. E.G., *Lockett v. Ohio*, 438 U.S. 586, 605-06 (1978).

All jury recommendations in cases resulting in a death sentence in the trial court can affect proportionality review, leading to arbitrary application of the death penalty in Florida where the jury's recommendation has been affected by use of the unconstitutional circumstance. See, *Espinosa*, supra.

> [Caselaw] produces a scattershot pattern of virtually identical cases, in some of which the ["CCP"} aggravating factor is applied and in the remainder of which it is not. The constitutional requirement of consistency, as well as Florida's legal mandate for proportionality in capital sentencing, are both clearly violated by such a pattern.

Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, XVII Stetson Law Review 47, 96-97 (1987). The CCP circumstance has not been consistently construed or applied. It fails to genuinely narrow the class of persons eligible for the death penalty. It is not rationally related to its purpose. Hence, it is unconstitutional under Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

The fact that the jury was instructed in the bare terms of this factor over timely objection undermines the jury death recommendation, as did the instruction on the HAC factor, as discussed previously and in *Espinosa*, supra. Both the HAC and CCP factors must be rejected, and they should play no part in the proportionality review conducted by this Court.

The use of other statutory factors in this case was improper. The State half-heartedly contends that this Court should disregard Justice Kogan's cogent argument in ***Ellis v. State***, 18 FLW S417, 420-21 (Fla. 1993) and continue to approve the use of convictions for contemporaneous violent crimes to show a previous conviction of a violent felony. (AB at 43-44). The aggravating statute passed by the Florida Legislature states, "The defendant was *previously* convicted of another capital felony or of a felony involving the use or threat of violence to the person." Section 921.141(5)(b), Fla. Stat. (1991). The statute is ambiguous as to whether the previous conviction must have occurred before the sentencing proceeding or before the capital felony. That ambiguity in legislation should be resolved by the courts in favor of the defendant to require that the conviction occur prior to commission of the capital felony.

Even with a tainted recommendation and use of improper aggravating factors, the death penalty is not here warranted in light of the substantial mitigation that exists. This case cannot legitimately be called one of the least mitigated of capital offenses. The State relies on ***Garcia v. State***, 492 So.2d 360 (Fla. 1986) as being comparable to this case because "this court indicated that the death penalty imposed for two first degree murder convictions arising out of a planned robbery which included a plan to murder witnesses was not disproportionate to the crime or to the death sentences that the court had approved statewide." (AB at 48-49).

Appellant, too, relies on ***Garcia***, and submits that the test stated there concerning the proportionality review to be conducted by this Court mandates that this death sentence be set aside:

> Our proportionality review is a matter of state law. (citations omitted). Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level.

Garcia, 492 So.2d at 368.

A review of all of the infant offenders in Florida who have had sentences of death imposed at the trial level is set forth in the Initial Brief of Appellant at pp. 22-27. Only two death sentences, both for seventeen-year-old infants, have been affirmed by this Court on direct appeal, and one of those has since received a life sentence. (See, Paul Magill, Affidavit of Prof. Michael Radelet, Appendix D to Initial Brief). As shown by that review which has not been addressed by the State, a death sentence for this sixteen-year-old offender is disproportionate to other cases under these material facts. It should accordingly be reversed and the matter remanded for imposition of a life sentence.

POINT II

THE CONVICTIONS AND SENTENCES MUST BE REVERSED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 DUE TO SERIOUS ERRORS WHICH UNDERMINE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THIS JURY

It is disturbing that the State perceives absolutely nothing wrong with a jury and judge having fixed opinions that crimes had been committed prior to hearing any evidence. Even more disturbing is the State's avoidance of addressing the basic unfairness of having jurors, over timely and repeated objections, *unnecessarily* exposed to the conclusions of their peers that the Farinas were "guilty" of "horrendous" and "terrible" crimes that "revolted" and "devastated" the citizens of Daytona Beach, crimes which were "upsetting for the entire community." (R1036; 1156; 1216). The needless exposure of the jurors to the emotional and prejudicial conclusions of other citizens who admitted having fixed opinions that the Farinas were guilty and that they should be put to death for their crimes was error that occurred over timely, repeated and specific objections by both defendants.

The voir dire of the venire in a group, in the presence of other prospective jurors, was a denial of the right to fair and impartial jurors and it caused the unfair presentation of prejudicial, extrajudicial evidence concerning the attitude of the Daytona Beach community to other veniremen who ultimately sat on this jury contrary to Amendments V, VI, VIII, and XIV to the United States Constitution and Art. I, §§ 9, 16, 17 and 22 of the Florida Constitution.

The State mocks, "What media coverage the jurors gleaned was literally splashed across the pages of voir dire. Individual voir dire was conducted. Appellant can hardly demonstrate prejudice because the court felt what was ultimately done may have been unnecessary." (AB at 52). Appellant submits that, over timely objection, this trial judge required defense counsel to elicit from prospective jurors irrelevant information that was needlessly, unfairly and unconstitutionally overheard by the jurors who ultimately decided this case. The specific opinions and conclusions of the jurors' peers were never published by the media. The fact that the judge finally, belatedly and with vocally expressed displeasure, allowed sequestered voir dire did not in any way remove the taint caused by the initial questioning procedure that was done at the insistence of the court in a manner that freely disseminated unfairly prejudicial information concerning the attitudes, conclusions, knowledge and beliefs of other jurors who could not be fair based on what they knew.

The prejudice here is not just exposure of the jurors to evidence concerning the alleged crimes, which would probably be heard anyway, but more importantly exposure to the attitudes, beliefs and opinions of their peers, other citizens of Daytona Beach, that these defendants are guilty and deserve the death penalty. The prejudice lies in the unfair, insidious influence such exposure would have on the jurors who were to decide the fate of these defendants.

The State left unaddressed the Court's unconstitutional restriction of the voir dire of these jurors. For example, the following occurred:

> Mr. Mott: Thank you, Your Honor. Would you consider at the sentencing stage, if, in fact, you're a juror and we ever get that stage, would you consider whether or not the person who has been charged was an abused child?
>
> Mr. Tanner: Objection, Your Honor. He's trying to preconvince the jury to --
>
> Court: Sustained.

(R1062).

> Mr. Mott: Okay. I'd like to ask these questions collectively of all of you, and if the court were to -- or there's one or two or three or four, perhaps. If the court were to instruct you that on the issue of mitigators -- you have heard reference to mitigators and aggravators. Everybody feeling comfortable with those terms so we're communicating? In other words, the mitigating circumstances are those matters which would mitigate against the imposition of the death penalty. Does everyone understand that?
>
> Mr. Tanner: Your Honor, I would object. It would not necessarily mitigate. It may be considered, but it may not be accepted by the jury. He's attempting to instruct.
>
> Court: Let him finish his question.
>
> Mr. Mott: And on the other side there are aggravators, or so-called aggravating circumstances, which are circumstances which may aggravate or justify imposition of the death penalty. I mean, that's a rough -- I just want to make sure everybody understands that. It's a little bit of a rough definition. Does everybody understand that? Okay. Now, if the judge were to instruct you that the potential for rehabilitation was a mitigating circumstance, would you consider that as a mitigating circumstance? Would everybody -- anybody disagree with that? Would they simply say, no, I'm not going to consider that no matter what?

> Mr. Tanner: Your Honor, I would object, again, to the specifics, and I have no objections to him asking the jury if they would follow the court's instructions. Certainly we all agree they should, but specific mitigator and aggravator is improper.
>
> Court: Until the case is before the jury, I think the objection is well taken. The objection will be sustained.

(R1184-85).

Thus, it became incumbent on the Court to instruct the jury that certain mitigating considerations, such as an abused childhood, as a matter of law were mitigating considerations. The limitation in questioning was unfair because, later, the standard instructions given this jury over objection left the jurors free to decide whether being an abused child and/or having a potential for rehabilitation were mitigating considerations *at all*, even though they were adequately proved to exist as a matter of fact.

Specifically, the standard instruction given over objection states the following:

> Among the mitigating circumstances you may consider if established by the evidence are, the defendant has no significant history of prior criminal activity, the age of the defendant at the time of the crime, and any other aspects of the defendant's character or record and any other circumstances of the offense.

(R1049). As set forth in Point V at page 88 of the Initial Brief, the standard instruction violates Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution by failing to inform the jury

that having a potential for rehabilitation and being an abused child are mitigating concerns that, if adequately proved to exist as a question of fact, *must* be weighed in opposition of a death sentence. Here, correct and fair instructions were timely proposed in writing. The requested instructions would have expressly, correctly informed the jury of the law concerning its constitutional duty to consider an abused childhood and a potential for rehabilitation in deciding the appropriate sentence. (R3035). Under the facts of this case, as to the penalty, it was reversible error to require that jurors be asked on voir dire whether they could follow the court's instructions yet then fail to include instructions in the areas about which defense counsel was restricted from asking pertinent questions.

A further consideration that renders the omission of such instructions to be a denial of due process and unfair under Amendments V, VI, VIII, and XIV and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution was the restriction imposed on the argument of defense counsel when State objections to proper argument were sustained by the trial court as follows:

> Defense counsel: Ladies and Gentlemen, I suggest that you must follow the law as it is written and as the legislature intended it. Because if you do not follow the law, then the consequences of that are, that you'll be left with that for the rest of your lives. I want to talk about the law specifically and the instructions that will be read and the manner in which they are set up. Mr. Tanner read a portion of those. You'll be instructed that it is your duty to follow the law and that you must render to the court an advisory sentence based

upon your determination first, as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty. The first thing you must determine is whether sufficient aggravating circumstances exist. Are there sufficient reasons to kill these two people? Only then do you go and look for reasons not to kill these people - for the mitigating considerations.

Prosecutor: Your Honor, I have to respectfully object. Counsel knows the jury is not being asked to kill anyone. They are being asked to --

Court: Sustain the objection.

Prosecutor: weigh the evidence in this case.

Court: Sustain the objection. Mr. Henderson, the Court will instruct the jury as to the law. You can lay that little form down there. I'll read the law to them as it applies to this case. You can comment upon it, but don't give them the law.

Defense Counsel: I suggest that, as you hear the instructions read to you by the court, you will find that the instructions are geared in a way that prefers a life sentence as opposed to killing the defendants.

Prosecutor: Excuse me, Your Honor.

Court: Sustain the objection. That's all. I have sustained your objection. Other matters can be taken care of later.

(TR1042-43). The objection(s) by the State and ruling(s) by the trial court denigrated the role of the jury and interfered with a full and fair opportunity to address the jury as to the propriety of a death sentence under the laws of Florida contrary to the

Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. See, *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Such errors undermine confidence in the integrity of the recommendation of this jury. The jury was not composed of peers of these defendants. Qualified jurors were improperly excluded. The State concentrates on the exclusion of Mr. Heffelfinger (AB at 52-56), and ignores the improper exclusions of Gulin (R1766-75) and Hudson (R1777-94), though their exclusion was raised at pages 57-58 of the Initial Brief. A review of the rulings by the court concerning Ms. Hudson's challenge for cause is instructive:

> Court: Miss Hudson -- Mrs. Hudson and Mr. Nichols, in this particular case the defendants are charged with murder in the first degree. Are either of you opposed to the imposition of the death penalty in an appropriate case?
>
> Nichols: No.
>
> Hudson: I have mixed feelings.
>
> Prosecutor: All right. Hiss Hudson, are your feelings such that you would never recommend the death penalty in, let's say, a murder case?
>
> Hudson: It would depend on the circumstances.
>
> Prosecutor: Okay. Are you telling me that you would fairly consider the imposition of the death penalty, depending on the evidence you heard in the courtroom?
>
> Hudson: Yes.
>
> Prosecutor: You would be able to do that?

Hudson: Yes.

(TR1777-78). Later, the defense challenged Mr. Nichols for cause based on bias revealed when he was questioned by defense counsel.[1] The Court summarily excused Ms. Hudson, evidently because the defense challenged Nichols:

> Prosecutor: While we're at it then, Judge, could we go ahead and challenge Mrs. Hudson for cause?
>
> Court: Let them object so it will be on the record and it will be granted. Put your objection on the record. Tell me why you object.
>
> Defense counsel: For the reasons previously stated that the defendant is entitled to a jury of his peers, and that includes people who are not only in favor of the death penalty, but opposed to the death penalty.
>
> Court: I thought it would be interesting to see how it works both ways. *So if I grant you, I'm going to grant him.*

(TR1792-94). The foregoing emphasized statement by the trial judge fails to instill any confidence that he was carefully analyzing the answers of these citizens to determine their legal qualifications to sit as jurors.

Both defendants sought to excuse Ms. Conover because of her steadfast position that she would impose the death penalty in

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[1] The defense challenge prospective juror Nichols, who was a strong supporter of the death penalty. He could not think of any first degree murder where he would not support the death penalty and, in determining an appropriate sentence, he would not be interested in such things as the age of the defendant or other factors about the person accused of the crime. (TR1777-78). Mr. Nichols was raised with the Bible and believed in an eye for an eye and a tooth for a tooth. (TR1790).

this case, a position which, as required by the trial judge over timely objection, was emotionally announced in the presence of the entire venire panel:

> Prosecutor: Kind of a long question. I'm sorry. Did either of you reach an opinion whoever did that must have the death penalty, that would be the verdict that if you were a juror --
>
> Conover: That would be my verdict, yes.
>
> Prosecutor: Now, you've not heard any facts in this case. You've only been exposed to the news media. Is it because of the news media exposure you're left with that impression?
>
> Conover: That is my personal opinion.
>
> Prosecutor: I'm just trying to get to a basis here. Is it because of the radio programs that you heard?
>
> Conover: No. I've not had that much hearing of it on the radio other than this morning, but because I have a child and the circumstances that I've heard about, that's what I would want to happen if it was my child.
>
> Prosecutor: Okay. So in this particular case, if you found these defendants guilty, you would necessarily recommend murder (sic)?
>
> Conover: Yes, I would.

(TR1283-84). Defense challenges for cause were denied (TR1303) and counsel was forced to use a peremptory challenge to extract Ms. Conover from the venire. (TR1304). These examples underscore the unfairness of not having sequestered voir dire and show why a reasonable doubt exists about the fairness and impartiality of the jurors who decided this case after hearing the attitudes and

opinions expressed by other citizens who admitted they had fixed opinions. The jury selection procedure was not conducted in a manner that ensured the fairness and impartiality of this jury.

It is respectfully submitted that the errors identified here and in the Initial Brief of Appellant require that the jury sentencing recommendation be given no weight. In the event this Court declines to require imposition of a life sentence based on its proportionality review, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT III

THE TRIAL COURT DENIED A FAIR TRIAL, DUE PROCESS AND AN IMPARTIAL JURY CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BY OVERRULING DEFENSE COUNSELS' OBJECTIONS TO PLACEMENT OF THE TELEVISION CAMERA, VICTIMS AND THE VICTIMS' FAMILIES IN CLOSE PROXIMITY TO THE JURORS AND PROSPECTIVE JURORS.

The State argues, "Neither the United States Supreme Court nor this court has found the presence of cameras in a courtroom to constitute a per se denial of due process." (AB at 56). In reply, Appellant submits that it is not the presence of a camera *per se* that is objectionable, but instead that the lens of *this* television camera was only one foot from jurors' faces over repeated objection. Those rulings were reversible error because it is an abuse of discretion for a trial judge to so clearly fail to ensure that jurors be free from distractions that might affect impartiality or distract them from listening to the evidence. This judge's actions denied the right to due process, a fair trial, impartial jurors and a reliable sentence under Amendments V, VI, VIII, and XIV to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. As at trial, the State misrepresents the distance of the camera from the jury. In artfully phrased sentences that erroneously imply that the judge was making a factual finding, the State argues, "Counsel's diagram was not to scale. The court **stated** that the camera was five or six feet away from the jury." (AB at 57, emphasis added). In context, however, the judge stated the following after two days of jury selection/objections:

Defense counsel: One other matter I would like to note. The camera during the last break was moved from its position in the aisleway from the first to the second row.

Court: Well, that even separates the jury and the victims even more.

Defense counsel: That's correct, Your Honor, but there were two days where the camera was specifically in the face of the jurors.

Court: In the face of them?

Defense Counsel: Of the prospective jurors. It would -- the measurement would show a foot.

Prosecutor: Your Honor, the camera at no time has been in the face of any juror and *we don't accept this diagram*.

Court: The camera I'm just putting that in for identifying only and it is not to scale and not accurate.

Defense Counsel: The measurements are accurate, Your Honor.

Court: The measurements are accurate, not to scale, though, is that it?

Defense Counsel: That's it.

Court: Eight feet between there, is that what it says?

Defense Counsel: No, Your Honor. Three feet.

Court: Three feet?

Defense Counsel. Three feet. If the court would recall, it has been moved back one row.

Court: Right. Okay. That's fine.

(R1590-92).

The trial judge required counsel to obtain a tape measure and to physically make measurements so that the record would be complete. (R1457). Counsel did so. The measurements shown on Defendant's Exhibit 1 (Appendix C to Initial Brief) are accurate, and if there is any doubt whatsoever about the verity of those measurements the distances can be reconstructed through use of the photographs taken contemporaneously by counsel which show the positioning of the television camera as it was being moved from the first aisle to the second aisle. (R2996-97; Appendix B to Initial Brief).

The State chides, "Counsel has revealed nothing to this court to demonstrate that the judge's description of the many objections as 'paranoid thinking' was not entirely warranted." (AB at 57). In reply, Appellant respectfully points out that the lens of a television camera was within a foot of the face of the nearest juror over timely and repeated objection when the judge told counsel to get a tape to measure the distance so the record would be complete. A television camera so placed and attended by a technician would necessarily and unfairly bring attention to the victims and their families contrary to the duty of the trial judge to ensure a fair trial under strict requirements set forth in the Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings.

The fairness of this trial is demonstrably suspect, in that the trial court utterly failed in its responsibility to provide a neutral and unbiased forum for this jury to decide the

fate of a sixteen-year-old infant offender charged with a highly publicized and emotionally compelling capital crime. A television camera placed one foot from a juror's face is intrusive and distracting. The camera was unnecessarily and unfairly placed where it would accent the suffering and presence of the victims and their families in the courtroom as the evidence was presented. This record conclusively shows that the jurors were being distracted. Prospective juror Pritchard, in discussing the presence of the television camera, noted, "You're making it very difficult for the jurors to be unbiased." (R1213).

This trial court abused its discretion in failing to take action to safeguard against patently obvious distracting and prejudicial influences in the courtroom, over timely objections. The resulting death recommendation of this jury is invalid, unreliable, and it was unfairly obtained in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. I, Sections 9, 16, 17 and 22 of the Florida Constitution. It is respectfully submitted that the errors identified in this brief and in the Initial Brief of Appellant require that the jury sentencing recommendation be given no weight. In the event this Court declines to require imposition of a life sentence based on its proportionality review, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT IV

INTENTIONAL PROSECUTORIAL MISCONDUCT DENIED A FAIR TRIAL AND/OR SENTENCING RECOMMENDATION CONTRARY TO ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Predictably, the State now argues that the intentional misconduct of its attorneys during trial is harmless because, "In the penalty phase of a murder trial, prosecutorial misconduct must be *egregious* to warrant vacating the sentence and remanding for a new penalty phase trial." (AB at 69, emphasis in original). In reply, Appellant submits that the deliberate misconduct which permeated this prosecution *was* egregious. The conduct of this State Attorney was carefully calculated to deny a fair jury recommendation. It did. If this Court declines to reverse the death sentence and order a sentence of life imprisonment based on the argument set forth in Point I, the intentional prosecutorial misconduct requires a new, fairly obtained jury recommendation. The prosecutor's deliberate abuse of the opportunity to make a proper opening statement during the penalty phase alone warrants reversal of this death sentence. See, ***Gamble v. State***, 492 So.2d 1132, 1135 (Fla. 5th DCA 1986) (deliberate misuse of objection process by prosecutor reversible error).

From the onset, it was clear that the only real question that a jury would decide was whether Jeffery Farina would receive death or life imprisonment for the murder of Michelle Van Ness. The State not only had three employees who would unequivocally identify these defendants, the State also had taped statements of

these defendants talking about the crimes. When arrested, they possessed money and property taken from the Taco Bell. There is now and never was any real doubt about the State's ability to prove the guilt of Jeffery Farina. That said, however, in light of the overwhelming mitigating considerations that attend this case, the State could not be sure of a death sentence.

The strength of the State's case as to guilt of these defendants was very apparent to all. The harmless error analysis that ordinarily is used on direct appeal to review prosecutorial misconduct was an open invitation for the State Attorney and his chief assistant to disregard clear rules of ethics and to use this highly-emotional and highly-publicized case as a centerpiece in the bid for re-election. The chief assistant had the same pecuniary interest in the successful and expeditious prosecution of this case as did the State Attorney. It was advantageous to Mr. Tanner's re-election to have a case of such interest to be tried locally, quickly and successfully.

After attempts to accelerate the case were thwarted when Judge Briese insisted on treating this case as he would any other first-degree murder, the State Attorney *personally* sought to avoid the adverse rulings and to deliberately circumvent the normal assignment of the case by *personally* asking the Clerk of the Court to assign the case in a manner so that it would not go to Judge Briese and instead go to Judge Orfinger, contrary to an existing order of the circuit's Chief Judge that controlled the routine assignment of capital cases. To the embarrassment of the

entire legal system, the State Attorney's improper manipulation of the assignment of the Taco Bell case was revealed by the Clerk of the Court prior to trial during his own re-election efforts.

Public suspicion about the integrity of the legal system in general and attorneys specifically is the end result of the State Attorney's deliberate actions. In its brief, the State apparently seeks to have this Court make a determination that Mr. Tanner did not ask the clerk to have the case assigned in a particular manner, or that its attorneys' intentions in doing so were pure as the new driven snow, that is, done out of concern for security and high school students who would skip school to attend the trial. (AB at 75-60). A factual determination that the State Attorney improperly asked the clerk to assign the case in a particular manner has already been made by the finder of fact following a full evidentiary hearing on the motion to disqualify Mr. Tanner's office. There is no doubt that the Clerk was personally asked by State Attorney John Tanner to so assign the case. As stated by Judge Orfinger, "this type of situation gives the entire judicial system a black eye." (R926).

That such conduct is improper is beyond any doubt. A state attorney cannot constitutionally select the judge that will preside over a case. See, ***State v. Simpson***, 551 So.2d 1303 (La. 1989). If the State Attorney truly had concerns over truancy or security, those concerns should have been announced in the form of a formal motion filed with the court rather than during a surreptitious meeting with the clerk. In light of the actions of

the State Attorney and the Clerk, it is small wonder that the legal profession is the subject of ridicule and suspicion. The timely revelation of and objection to the State Attorney's contact with the clerk gave the trial court the opportunity to immediately and conclusively demonstrate to the bar and the public that such an abuse of power and authority to manipulate a case prior to trial would result in that attorney having no further dealing with that case.

Judge Orfinger, confident in his ability to be fair, let the impropriety slide, and in doing so encouraged the State Attorney to persist in improper tactics and created, in Anthony Farina's mind at least, the perception of complicity between the court and the State Attorney. It is truly amazing that the State has the temerity to argue, "Appellant had no standing to have Judge Orfinger removed from the case * * * [because] * * * 'in legal contemplation judges, like litigants, are equal before the law.'" (AB at 60-61). Jeffery Farina had then and has now no objections or questions about the integrity of Judge Orfinger or his ability to fairly hear this case. Rather, the objections went squarely to the integrity of Mr. Tanner and his ability to fairly prosecute this case.

The State urges, "While a prosecutor can be removed from the case in conflict situations, * * * , there is no authority for disqualifying a prosecutor in a situation such as this." (AB at 61). Appellant respectfully disagrees. This Court has approved the removal of a defense attorney upon the motion of

the state where it was demonstrated that the actions of that attorney were impeding the other party's right to a fair trial. See, *Burns v. Huffstetler*, 433 So.2d 964 (Fla. 1983) (trial court's removal of defense attorney upon motion of State and appointment of public defender to represent defendant accused of first-degree murder approved due to intentional violation of rules of discovery and intentional, improper delay trial). In fact, the trial court has the duty to provide a fair and impartial forum for the litigants.

Disciplinary constraints are neither synonymous with nor mutually exclusive of the trial court's inherent, independent authority to ensure that litigants receive a fair trial:

> If removal of an attorney is considered to be discipline, then respondents' contention is correct and the trial court had no jurisdiction to remove counsel. The basic purpose of the trial court is to ensure litigants an impartial forum in which their complaints and defenses may be presented, heard and decided with fairness. This purpose transcends the right of attorneys to be controlled in their conduct by the supreme court. It is unquestioned that a trial court may control an attorney for contemptuous conduct. (citations omitted). It may deny an attorney leave to withdraw from a case. (citation omitted). Therefore, a trial court may decide, after consideration of a motion alleging sufficient facts which, if true, would warrant removal of opposing counsel, that removal is mandated. If those allegations also constitute a breach of the Florida Bar Code of Professional Responsibility, the trial judge should then initiate those procedures which have been established to discipline attorneys. The discipline or punishment of the attorney will then be decided, not by the trial court, but by the supreme court after the appropriate procedures have been followed.

Pantori v. Stephenson, 384 So.2d 1357, 1359 (Fla. 5th DCA 1980).

This Court should conclusively address this calculated and deliberate breach of ethics by an elected State Attorney that has occurred after repeated warnings and admonitions from this Court and at the same time provide guidance to trial judges as to the extent of their inherent power to ensure fairness in upcoming litigation. The State seeks to shift the focus away from its own attorney's calculated misconduct by simplistically protesting, "Appellant has failed to demonstrate how being arraigned two weeks early has worked to his detriment." (AB at 61). Prejudice is not found in being arraigned two weeks early, but instead in being prosecuted by an elected official who was shown prior to trial to be personally manipulating the assignment of this case contrary to the Chief Judge's Administrative Order. This is not a situation where an attorney got caught up in the heat of advocacy during trial and crossed an ethical constraint which attorneys may and, at times, certainly must properly approach to provide zealous representation. In that regard, it is to be expected, though surely not condoned, that ethical boundaries will at times *unintentionally* be exceeded by even the most ethical attorneys.

Where ethical considerations are inadvertently transgressed, such "misconduct" is not intentional, and because the entitlement of the litigants is to a fair trial and not a perfect one, a harmless error analysis such as the one touted in ***State v. Murray***, 443 So.2d 955 (Fla. 1984) makes sense. But a harmless error analysis for deliberate misconduct by an elected

State Attorney who, prior to trial, was shown to be cheating to advance his own political agenda is inadequate.

Appellant respectfully draws this Court's attention to the following dissenting opinion of Judge Dauksch:

> That the defendant is guilty is of little doubt but all persons are entitled to a fair trial. In addition to, in fact paramount to, the duty of a prosecutor to seek a conviction is the duty to assure a fair trial. It is justice the state, through the court, seeks, not anything less. To require a new trial is the only effective remedy for the most serious misconduct.

Cole v. State, 19 FLW D75, 76 (Fla. 5th DCA January 7, 1994) (Dauksch, J., dissenting). Although instances of prosecutorial misconduct are becoming more prevalent[2], it is yet disappointing that an elected State Attorney would so intentionally circumvent rules governing the ordinary administration of justice and assignment of cases solely to forward his own political agenda. The intentional misconduct by the State Attorney was conclusively shown to exist before trial. The trial court should have at that point exercised its authority to ensure a fair trial.

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[2] "[W]e are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. (citations omitted). * * * It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office. Nor may we encourage them to believe that so long as their misconduct can be characterized as 'harmless error,' it will be without repercussion. However, it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction." ***Bertolotti v. State***, 476 So.2d 130, 133-134 (Fla. 1985).

A harmless error analysis concerning the deliberate and intentional misconduct by an elected State Attorney, when timely objected to and proved to exist prior to trial, should be viewed in the context of the judge who was faced with the motion to disqualify that State Attorney in order that the defendant(s) receive a fair trial. The trial court declined to rebuke the prosecutor or impose any safeguard to ensure a fair trial because, in his mind, the trial judge believed that he could and would be fair to both sides despite the State Attorney's abuse of power. However, the court should have exercised its inherent authority to ensure that the litigants received a fair trial upon timely objection by both defendants.

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or of the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Section 59.041, Florida Statutes (1993).

Using this "liberally construed" standard, State Attorney Tanner should have immediately been prevented from having further involvement in the case when it was shown that he personally, improperly asked the Clerk to have the case assigned contrary to the order of the Chief Judge that controlled ordinary assignment of capital cases. It was a miscarriage of justice to allow a defendant on trial for his life to be prosecuted by an elected

official who was shown to be ignoring the ethical precepts of his profession in order to further his own political agenda.

In the event this Court declines to order imposition of a life sentence, a new penalty phase is required because the calculated misconduct of this State Attorney and his chief assistant cannot reasonably be deemed to be harmless:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the rights of the appellant.

Section 924.33, Fla.Stat. (1993). The denial of the timely motion to disqualify State Attorney Tanner seriously affected a substantial right of this defendant, that being the right to be prosecuted by a representative of the State of Florida who would strive to scrupulously adhere to ethical considerations rather than by a State Attorney who would intentionally disregard them in order to unfairly obtain a conviction and death sentence.

POINT V

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S SPECIALLY REQUESTED JURY INSTRUCTION(S) DENIED DUE PROCESS, A FAIR JURY TRIAL AND A RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State contends that no authority was cited "for [the] novel proposition that the trial court should have instructed the jury that where a statute does not define words of common usage, such words are to be construed in their plain and ordinary sense and that expressly defined statutory words must be followed according to their fixed legal meaning." (AB at 70). Appellant disagrees. Authority for the instruction was cited to the trial court contemporaneously with the written proposed instruction (R2998) and to this Court. (IB at 84). It is hardly a novel proposition that litigants are entitled, upon timely written request, to have the jury correctly and fairly instructed on an important premise of law:

> The law is very clear that the court, if timely requested, as here, must give instructions on legal issues for which there exists a foundation in the evidence. (citation omitted). It is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction. The jury is admonished to take the law from the court's instruction, not from the argument of counsel. It must be assumed that this admonition is generally followed. For this reason the error may not be considered harmless.

Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981).

It is essential in the sentencing phase of a capital trial that the jury be fully and fairly instructed on the law pertaining to imposition of the death penalty. The absence of this requested instruction left jurors free to use the common definitions of the terms contained in the statutory aggravating factors rather than the precise legal meanings of those terms that are required by this Court and the Constitution. The jury is the co-sentencer in Florida, as explained in ***Espinosa v. Florida***, 505 U.S. ___, 112 S.Ct. 2926 (1992). The refusal of this judge to instruct the jury that as a matter of law the statutory definitions of terms control the usage of terms of art resulted in a violation of due process and otherwise provided the jurors with unfettered discretion to impose this death penalty based on vague and subjective standards in violation of Art. I, §§ 9, 16, 17 and 22 of the Florida Constitution and Amendments V, VI, VIII, and XIV to the United States Constitution.

Similarly, the refusal of the trial judge to instruct the jury, as proposed in writing and timely requested, that being an abused child and having the potential for rehabilitation are valid mitigating considerations likewise denied due process and denied a fair and reliable sentencing determination in violation of Art. I, §§ 9, 16, 17 and 22 of the Florida Constitution and Amendments V, VI, VIII, & XIV, to the United States Constitution. See, ***Stewart v. State***, 558 So.2d 416, 420 (Fla. 1990) ("trial court is required to instruct on all aggravating and mitigating circumstances 'for which evidence has been presented.'").

The State asks this Court to consider the refusal of this trial judge to give the timely requested instructions in a vacuum by arguing that the instructions given here were standard instructions which have previously been approved by this Court in other cases. (AB at 73). In reply, Appellant submits that it was an abuse of discretion in the context of this case for the trial court to refuse to expressly instruct the jury that an abused childhood and a potential for rehabilitation as a matter of law are mitigating considerations because, as set forth previously, the court sustained State objections and prevented counsel from ascertaining during voir dire whether jurors would consider those things as mitigating considerations at all.

The court should, upon timely request should have instructed these jurors on the law which requires that such factors as a defendant's abused childhood and a potential for rehabilitation be considered by the sentencer in deciding the appropriate sentence. The Standard Jury Instruction given to the jury and set forth on page 73 of the State's Answer Brief improperly allows the jury, as co-sentencer, to arbitrarily ignore valid mitigation if, in the juror's mind, that particular consideration is not mitigating in nature, even if it is proved to exist as a matter of fact. When defense counsel sought to ask such questions, the Court repeatedly sustained objections by the State in the presence and within hearing of the jury venire.

The following are a few objections of such rulings:

(Defense Counsel): Would you consider on the issue of what the appropriate penalty is, would you consider matters of, for example, family background of the person accused?

Ms. Lee: No.

Q: Would you consider on the issue of appropriate penalty whether or not a person had an abusive background?

A: No.

(Mr. Tanner) Excuse me. If it please the court, I would object. The out-of-context nature he's asking the jurors to negatively commit to a course of conduct without having the court's instructions or the benefit of the law, and it's an improper question.

Court: I would sustain the objection. I would ask the lady would you follow the instructions as given to you by the court?

Lee: Yes.

Court: You may proceed, Mr. Mott.

(R1080-81).

(Defense counsel): Would the age of the person who is accused have a bearing on your decision whether or not death is an appropriate penalty?

(Mr. Tanner): If Your Honor please, I would again object. That's one of the standard potential mitigating factors. The jury is being asked questions out of context.

Court: Right. Objection sustained.

Mr. Tanner: Your Honor, I would have no objection to a question, will the prospective jury members consider all the potential mitigating factors and any the court permits to he heard during the trial.

> Defense counsel: In order to do that --
>
> Court: Go ahead.
>
> Defense counsel: In order to do that, I have to go down mitigators.
>
> Court: That's what we don't need to do today. We're not here to instruct the jury, just trying to find a jury that can impartially try the case without any outside factors. That's all we're here for and can they follow the instructions of the court.

(R1086).

> (Mr. Tanner): Your Honor, I would object, again, to the specifics, and I have no objections to him asking the jury if they would follow the court's instructions. Certainly, we all agree that they should, but specific mitigator and aggravator is improper.
>
> (Court): Until the case is before the jury, I think the objection is well taken. The objection will be sustained.

(R1185).

The court thus required that counsel simply ask the prospective jurors whether they would follow the law and clearly apprised the jury, who overheard the State's objections and the court's rulings, that they would receive instructions at the conclusion of the case as to what mitigating considerations could and should be weighed by them in making a lawful sentencing determination. It was thus incumbent on the court to fully instruct the jury that the law required that, when proved to exist, a defendant's abused childhood and potential for mitigation constitute valid mitigating considerations which must receive weight in the sentencing determination.

The law set forth in ***Campbell v. State***, 571 So.2d 415, 419 (Fla. 1990) exemplifies the constitutional error that occurs when the sentencer arbitrarily fails to consider valid mitigation in the belief that, though adequately proved as a matter of fact, that fact does not qualify in the sentencer's mind as bona fide mitigation. In ***Campbell***, the trial court felt that a defendant's deprived and abusive childhood was not a mitigating factor at all, even though it was not controverted that Campbell had been abused as a child. Id at 419, fn. 2. Because all trial courts were experiencing problems in properly applying mitigating circumstances, this Court explained that the sentencer must weigh certain mitigating considerations as a matter of law if any of the following were proved to exist as a matter of fact:

1) Abused or deprived childhood.

2) Contribution to community or society.

3) Remorse and potential for rehabilitation.

4) Disparate treatment of equally culpable codefendant.

5) Charitable or humanitarian deeds.

Campbell, 571 So.2d at 419, fn. 4.

If trial judges, who are presumed to know the law and their responsibility to consider these factors under Florida law, were unconstitutionally, categorically rejecting a defendant's abused childhood and potential for rehabilitation as mitigating considerations under the rationale that even though they exist as a matter of fact they are not felt to be mitigating, so too are Florida citizens. They are entitled to be instructed on the law

just as this Court instructed the trial judges in ***Campbell***. When there is a timely and specific written request as was made here, what earthly justification can there be for not fully and fairly instructing the jury in the same manner that this Court found it necessary to instruct trial judges who were improperly rejecting valid mitigating considerations that were adequately proved to exist, but which were not viewed as "mitigating" to that individual judge?

Here, the trial judge was expressly, properly asked in writing to instruct the jury on the law as this Court explained it in ***Campbell***. (R3035). The rejection of that instruction in the context of this case, where overwhelming competent evidence was presented that Jeffery Farina was an abused child who had a great potential for rehabilitation, was an arbitrary abuse of discretion which denied due process and a fair sentencing recommendation where the judge indicated previously to the jury that, at the conclusion of the case, the court would expressly instruct the jury on all considerations that must be weighed to make a correct and lawful sentencing determination. The omission of this or a substantially similarly specific instruction renders this death sentence arbitrary and capricious in violation of Amendments V, VI, VIII, and XIV and Art. I, §§ 9, 16, 17 & 22, Florida Constitution.

It is constitutionally required for trial judges to weigh uncontroverted mitigating evidence in opposition of the death sentence. So, too, is it thus necessary for the jury

in Florida to be required to weigh such uncontroverted mitigating evidence. It was incumbent and necessary for the trial court to so instruct this jury under these facts upon timely, written request. Where the statutes and/or caselaw have previously, expressly recognized the mitigating worth of a particular feature or consideration, such as a defendant having an abused childhood and/or a potential for rehabilitation, the failure of the court to so instruct the jury that such factors are mitigating if proved to exist is a denial of due process and a fair proceeding which results in arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. I, Sections 9, 16, 17 and 22 of the Florida Constitution.

POINT VI

FLORIDA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

The State "raises the affirmative defense of waiver and procedural bar" and makes no attempt to address the merits of the arguments presented. (AB at 74). In reply, Appellant submits that the facial constitutionality of Florida's death penalty statutes may properly be raised on direct appeal:

> A review of the chapter law at issue reflects that it affects a quantifiable determinant of the length of sentence that may be imposed on a defendant. Section 775.084 allows a court to impose a substantially extended term of imprisonment on those defendants who qualify under the statute. * * * Clearly, the habitual offender amendments contained in chapter 89-280 involve fundamental "liberty" due process interests. Contrary to the question raised in [*Sanford v. Rubin*, 237 So.2d 134 (Fla. 1970)], we find the issue in this case to be a question of fundamental error.

State v. Johnson, 616 So.2d 1, 3 (Fla. 1993). See, *Trushin v. State*, 425 So.2d 1126 (Fla. 1982). Similarly, the statute authorizing imposition of the death penalty "affects a quantifiable determinant of the length of sentence that may be imposed on a defendant." Fundamental due process interests are undeniably present.

Further, it is clearly a useless act to present such issues to a trial judge, who is bound by the precedent of this Court which, as the State is quick to point out, has previously rejected such arguments and objections.

CROSS-APPEAL - ISSUE I: WHETHER THE TRIAL COURT ERRED IN PROHIBITING THE STATE FROM INTRODUCING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE?

In a cursory, one and one-half page "argument," the State contends that it was error for the trial court to prohibit the victims' families from presenting testimony concerning the background of the victims during the penalty phase. (AB at 75-76). The seven page, detailed order of Judge Orfinger, which later was enforced by Judge Blount, was absolutely correct. The State cites *Hodges v. State*, 595 So.2d 929 (Fla. 1992) as an "indication" that a victim's family members can give testimony regarding the impact of the victim's death on the family so long as the victim's family members do not characterize or give and opinion about the crime, defendant, or appropriate sentence. The State fails to address the problems noted by Judge Orfinger, including the fact that such evidence is irrelevant under Florida's death penalty scheme.

The jury is not told how to consider such testimony. It fails to in any way prove or disprove the existence of any statutory aggravating factor set forth in § 921.141(5), Florida Statutes. The arbitrary introduction of such testimony, without any explanation to the jury as to how it is to be used in deciding an appropriate sentence, invites emotional, arbitrary and capricious imposition of the death sentence. A sentencers' unguided consideration of such information fails to genuinely limit the class of persons eligible for the death penalty, which would render a death sentence so imposed unconstitutional.

There are controlling constitutional considerations which prevent the unfettered introduction of such prejudicial testimony in the absence of any meaningful restriction or guidance as to its use.

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

Gregg v. Georgia, 428 U.S. 153, 188-89 (1976). Statutes now carefully restrict what the jury may consider as justification for imposition of a death sentence:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743 (1983).

Clearly, introduction of testimony concerning the suffering of family members over the loss of a loved one is irrelevant until such time as the sentencer in Florida is given meaningful guidance as to how such evidence is to be used.

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

Here, the State called Ms. Van Ness' father to the witness stand in clear defiance of Judge Orfinger's prior ruling, which had previously been extensively litigated and conclusively decided against the state. (R2383-2389; 2446-2456; 2457-2461). The display of the suffering of Mr. Van Ness to the jury just before they were to make a sentencing recommendation was yet another example of this State Attorney ignoring his ethical duty to ensure that a fair trial was conducted. Judge Orfinger's ruling was issued on October 21, 1992, which gave the State ample time to seek further review of the legal efficacy of the order prior to trial in accordance with established rules of procedure. Instead, the State Attorney waited until the penalty phase was being held and then called Mr. Van Ness to the stand in the presence of the jury, after attempting to stage a re-enactment of the murder. (See Appendix A).

Mr. Tanner was not attempting to present relevant evidence, but instead was succeeding in rousing the emotions of the jurors. His stated purpose was "to establish the age of the victim and the fact that she was a high school student living at home." That information is irrelevant. It does not legally prove or disprove the existence of any statutory aggravating consideration. When vague terms such as "heinous," "atrocious," "cruel," and "cold" are the parameters, however, such testimony would clearly weigh on the minds of the jurors/sentencers. There can be no doubt that the carefully planned theatrics were to inflame the emotions of these jurors. It was deliberate.

The guile of the State Attorney, who repeatedly made unethical jabs throughout the trial as set forth previously, is shown by this announcement to the Court, made in the presence of the jury after the jury had been repeatedly shuffled in and out of the courtroom:

> Court: Mr. Tanner, you can call your next witness.
>
> Mr. Tanner: Thank you, Your Honor. *In view of the objections and the rulings of the Court the state has no evidence it may present at this time.*

(TR621) (Appendix A).

The foregoing conduct of the State Attorney was a deliberate denial of a fair jury recommendation in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution, just as surely as would have been the unrestricted introduction and use of the excluded testimony of the relatives of these victims. The trial court did not err in preventing the introduction of such testimony. It did, however, err in allowing the prosecutor to circumvent the previous, unequivocal rulings that prohibited the exposure of the jury to such considerations. In any event, the State asks for no relief in respect to this purported error, so this point is moot.

CROSS-APPEAL - ISSUE II: WHETHER THE TRIAL COURT ERRED IN PRECLUDING THE STATE FROM CONDUCTING A SINGLE TRIAL OF APPELLANT AND HIS TWO CODEFENDANTS USING REDACTED CONFESSIONS AND STATEMENTS?

Again, the State asks for no specific relief, and Appellant has no idea as to what, precisely, the State would have this Court do. The State concludes its argument by contending, "The admission of testimony not subject to cross-examination *may be harmless where the testimony is merely cumulative and other evidence of the defendant's guilt is overwhelming.*" (AB at 78, emphasis added). Evidently, the State's approach on appeal is the same as it was at trial, that is, to allow error to occur because it can be deemed "harmless" on appeal. Such is a skewed definition of what is meant by a fair trial.

Because the State's two-page "argument" is disjointed and unintelligible, Appellant cannot meaningfully respond.

CROSS-APPEAL - ISSUE III: WHETHER THE TRIAL COURT ERRED IN GRANTING A JUDGMENT OF ACQUITTAL NON OBSTANTE VEREDICTO AS TO THE OFFENSES OF KIDNAPPING?

It should be noted at the onset that resolution of this question has little, if any, real significance in this case. This defendant received six consecutive life sentences in accordance with the recommended guideline sanction, based on a total of 485 points. (R3130). Those consecutive sentences are to be served after the sentence for the capital felony, which at least is yet another term of life imprisonment with a mandatory twenty-five year term of imprisonment. The addition of points for kidnapping convictions does not change the recommended sanction for the non-capital felonies and requiring that four more consecutive life sentences be served by this defendant is essentially meaningless - Jeffery Farina will already spend the remainder of his life in prison.

Again, in violation of Fla.R.App.P. 9.210(b)(6), the State does not ask for any precise relief in reference to this point on cross-appeal. However, in its argument, the State does contend that, "In *Faison v. State*, 426 So.2d 963 (Fla. 1983), this court literally rewrote the statute in adopting standards more stringent than required by the Legislature. Appellee [sic] respectfully submits that the court should recede from *Faison*." (AB at 78). Thus, it appears that the Cross-Appellant is asking this Court to recede from Faison and/or to overturn the verdict of acquittal on the kidnapping charges. The trial court acted properly in granting the judgments of acquittal.

In *Faison v. State*, 426 So.2d 963 (Fla. 1983), this Court agreed that, if literally interpreted, Florida's kidnapping statute would apply to virtually every felony which involves the unlawful confinement of another person, such as robbery or sexual battery. By the same reasoning, if literally interpreted, the statute would also apply to virtually every instance of murder. Specifically, Section 787.01 defines kidnapping as follows:

> The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> Hold for ransom or reward or as a shield or hostage.
>
> Commit or facilitate commission of any felony.
>
> Inflict bodily harm upon or to terrorize the victim or another person.

In that regard, the facts of this case are similar to those of *Kirtsey v. State*, 511 So.2d 744 (Fla. 5th DCA 1987), where one employee was bound while the other was forced to open the safe. The movement and confinement of both employees was limited to the inside of the restaurant which was slight and merely incidental to the robbery. Similarly, there was no "confinement," "imprisonment," or "abduction" of these employees such that separate offenses of kidnapping occurred. The limited movement and confinement of these four occupants was within the interior of the store and it was not significant. The employees were not taken outside of the premises and were never barricaded

in a separate compartment. See, ***Ferguson v. State***, 533 So.2d 763 (Fla. 1988) (forcing employees outside of building and shutting them into bathroom sufficient to prove kidnapping). Though at some point they were bound, they were not blindfolded for half an hour and dragged from room to room. See, ***Marsh v. State***, 546 So.2d 33 (Fla. 3d DCA 1989). Based on the rationale set forth by this Court in ***Walker v. State***, 604 So.2d 475 (Fla. 1992), the trial judge was correct in entering an acquittal as to the four charges of kidnapping.

CONCLUSION

Based on the argument and authority set forth in the Initial Brief of Appellant and in this brief, this Court is asked in reference to Points I and VI to reverse the death sentence and to remand for imposition of a life sentence; in reference to Points II through V, to reverse the convictions and remand for a new trial or, alternatively, to reverse the death sentence and remand for a new, fair penalty phase. No relief should be accorded the State/Cross-Appellee in reference to the three issues it raised on cross-appeal because the State has not asked that any relief be provided and no relief is warranted in any event.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Ste. 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to Mr. Jeffery Allen Farina, #725254 (44-1235-A1), P.O. Box 221, Raiford, FL 32083, this 18th day of February, 1994.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JEFFERY A. FARINA, Defendant/Appellant, v. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 80,985

A P P E N D I X

Appendix A: Transcript of penalty phase. (TR604-621)